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No. 95-1882

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, *Petitioner*,

v.

JESS RODERICK MITCHELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SIXTH APPELLATE DISTRICT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In accordance with Supreme Court rule 16, subdivisions (6) and (7), we here address several new points respondent raised in his opposition. By not addressing respondent's other points, we do not imply agreement with them.

1. The Federal Question Is Properly Before This Court Notwithstanding Our Failure To Raise It In The Court Of Appeal.

Our petition raises the federal question of whether it can be (and, if so, in this case is) harmless error for a trial court to instruct a jury that the prosecution has proved one (or more) of the elements of

the charged offense. Respondent correctly notes that we did not present this issue to the Court of Appeal, first raising it in our petition for review to the California Supreme Court. Respondent believes our omission should defeat our claim to review by this Court. Opp. at 7.

He is incorrect because he overlooks a critical fact: the Court of Appeal resolved the issue. It wrote:

> "Because the removal of the materiality issue from the jury is reversible per se, the trial court's error is incurable by harmless error analysis. (*People v. Kobrin* [1995] 11 Cal.4th [416] at pp. 428-430.) [903 P.2d 1027, 1034-1035 (Cal. 1995)]." Cert. Pet. App. A at 24.

It is an

> "'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.' [Citations omitted.]" *Orr v. Orr*, 440 U.S. 268, 274-275 (1979).

This rule soundly reflects the policy behind the requirement that this Court will refrain from considering issues raised for the first time before it.

> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since

> the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Where, as here, the intermediate state appellate court has in fact considered the federal question, it has allayed these policy concerns. Respondent argues that "the issue was not fully developed" (Opp. at 14), but he has identified no way in which the record before this Court is deficient or how it would have been any different had we raised the issue in the state Court of Appeal. Nor has respondent explained how our failure to raise the issue prevented the appellate court from deciding the matter based on an independent state ground. Indeed, the thrust of respondent's later argument is that the Court of Appeal *did* rely on an independent state ground in that it cited *Kobrin*, which in respondent's view establishes an independent state ground for finding the error prejudicial. Opp. at 23.

Respondent contends that (1) the California Supreme Court denied our petition for review because we failed to raise the issue in the state Court of Appeal, and (2) this Court should or must enforce what he considers the state Supreme Court's procedural bar. Opp. at 10-13. To demonstrate that the state Supreme Court's denial of review rested on procedural grounds, respondent cites California Rules of Court, rule 29(b), which provides:

> "As a matter of policy, on petition for review the Supreme Court normally will not consider:

> (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal. . . ." Opp. at 10.

Respondent is incorrect. When the California Supreme Court summarily denies review, that denial means nothing more nor less than what it says: review has been denied. The summary denial carries no implication of the reason for the denial. See *Cole v. Rush*, 45 Cal.2d 345, 351, n. 3; 289 P.2d 450, 453, n. 3 (1955) [denial of review may mean only that an adequate ground for granting review has not been raised]; *People v. Davis*, 147 Cal. 346, 350 (1905) [denial of review is not to be taken as an expression of any opinion by the court]. Thus, when an issue could have been timely raised below but was not, and when a petition for review of that issue is denied without explanation, the conclusion does not follow (as respondent would have it) that the California Supreme Court denied the petition because the issue was not timely raised below.

Moreover, if, somehow, one could attribute a reason to the state high court's summary denial of our petition for review, respondent's contention would still fail. An unexplained refusal by the state high court to consider an issue on habeas corpus creates the presumption that the court acted on the same ground as did the lower appellate court. (*Ylst v. Nunnamaker*, 501 U.S. 797, 803 (1990). Since the Court of Appeal reached and rejected the harmless error issue on the merits, the Supreme Court's "silent denial" of review may not be interpreted as a procedural bar.

To summarize. The Court of Appeal ruled on the harmless error issue, and there is no indication that that court felt at all hampered in doing so by our failure

to argue the issue. Then, when we gave the California Supreme Court the opportunity to review the Court of Appeal's ruling, the high court gave no indication that it considered itself procedurally barred from doing so. Respondent asks this Court to reject our certiorari petition because we declined to burden the Court of Appeal with an argument that would have served no purpose and, in any event, that no state court has suggested we should have made. Moreover, respondent has failed to show how our failure to raise the issue in the Court of Appeal would adversely affect this Court's consideration of it. We conclude that our failure to raise the issue in the Court of Appeal is irrelevant.

2. Even If, As Respondent Contends, Our Harmless Error Approach Is Incorrect, This Case Presents A Perfect Opportunity For This Court To Resolve Conflicts Between The Circuits And Between State And Federal Law In California.

Respondent next attacks the merits of the harmless error approach set forth in our petition for certiorari. Opp. at 15-22. Even if his criticism is entirely justified, that is no reason for this Court to reject this case.

As respondent points out (Opp. at 20, n. 15), different circuits have ruled differently on the question of whether an instruction may be harmless if it directs a jury not to consider an element of the charged offense. Four circuits have indicated that the error is reversible per se. *People v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995); *United States v. Johnson*, 71 F.3d 139, 142-143 (4th Cir. 1995) [but not reversible as plain error]; *United States v. Ross*, 77 F.3d 1525, 1540 (7th Cir. 1996); *United States v. Gaudin*, 997 F.2d 1267, 1272 (9th Cir. 1993). The Eight Circuit has found that harmless error analysis applies.

United States v. Raether, 82 F.3d 192, 194 (8th Cir. 1996); *United States v. Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996). Only this Court can resolve the conflict.

At least a potential conflict also exists between the State of California and the Ninth Circuit. Under conditions unspecified in *Kobrin*, instructing a jury not to consider an element may be harmless error. *People v. Kobrin*, 11 Cal.4th at 428, n. 8; 903 P.2d at 1034, n. 8, *supra*. Under the Ninth Circuit's decisions in *United States v. Gaudin*, 997 F.2d at 1272, *supra*, and *Roy v. Gomez*, 81 F.3d 863, 866-867 (9th Cir. 1996), such error is reversible per se. Once again, only this Court can resolve the conflict.

This case is an appropriate vehicle for resolving these conflicts because the instructional error here was stark: the trial court not only inferentially but expressly directed the jury not to consider the element in question and, hence, can fairly be characterized as "[d]irecting a partial verdict against the defendant on one element [of the offense]. . . ." Opp. at 20. If, then, it matters that the element was expressly removed from the jury, this case perfectly illustrates that principle. If it matters that the element was "omitted," this case illustrates that as well. And if, as we contend, error characterization of this sort is nonsense and all that matters is the evidence the jury considered and the findings it made, this case is the perfect exemplar as well. In sum, regardless of the outcome, this case presents an ideal opportunity for this Court to resolve the vexing issue of whether it can be harmless error for a trial court to instruct a jury not to decide an element of an offense.

3. *Mitchell*'s Finding Of Prejudicial Error Rests Entirely On Federal Law.

Mitchell relied on *Kobrin* to find the instructional error per se reversible. Assessing the identical instructional error, *Kobrin* stated that such an error would be harmless in a case in which the jury necessarily resolved adversely to the defendant the factual question posed by the erroneous instruction. *People v. Kobrin*, 11 Cal.4th at 428, n. 8; 903 P.2d at 1034, n. 8, *supra*, citing *People v. Sedeno*, 10 Cal.3d 703, 721; 518 P.2d 913, 925 (1974). *Kobrin* then noted it did not need to decide "whether and under what *other* circumstances a reviewing court may determine [that] the omission of [an] instruction on an element was harmless beyond a reasonable doubt." *Ibid.* [Emphasis added.] Relying on this footnote in *Kobrin*, respondent contends that the harmless error decision in that case (and, hence, by extension, the harmless error decision in this one) rested on independent state grounds. Opp. at 23.

The contention is ludicrous. The wording of the footnote itself makes clear that the state high court left open the possibility that the omission of an element may be found harmless even in a case that does not meet the requirements of the *Sedeno* test. If that possibility exists, then failure under the *Sedeno* test cannot afford an independent and adequate state ground for reversal. From the footnote itself, then, it is clear that *Kobrin*'s reference to the *Sedeno* test means only that that test satisfies federal law and that a more lenient test may do so as well -- not that an instructional error must be reversed irrespective of federal law if it fails the *Sedeno* test.

The rest of *Kobrin* underscores the point. *Kobrin* relied on three federal cases to find the error reversible -- *Sullivan v. Louisiana*, 508 U.S. 275 (1993);

Yates v. Evatt, 500 U.S. 397 (1990), and *Rose v. Clark*, 478 U.S. 570 (1986). *People v. Kobrin*, 11 Cal.4th at 429-430; 903 P.2d at 1034-1035, *supra*. *Kobrin* never mentioned the California Constitution, a state statute, or the concept of independent state grounds, even though, as respondent notes, the defendant argued independent state grounds. Opp. at 24 and Opp. App. F. Moreover, the concurrence in *Kobrin* of Justice Mosk, who is neither hesitant about asserting independent state grounds nor indirect when he does so (*People v. Cahill*, 5 Cal.4th 478, 514; 853 P.2d 1037, 1062 (1993), Mosk, J., diss.), relies entirely on the federal constitution to reach the conclusion that the error was reversible per se. *People v. Kobrin*, 11 Cal.4th at 430; 903 P.2d at 1036, *supra*, Mosk., J., conc.

Finally, we note that in assessing the issue of prejudice of instructional errors on elements of an offense the California Supreme Court has been attempting to follow the lead of this Court for more than a decade. For example, *People v. Garcia*, 36 Cal.3d 539, 554-555; 684 P.2d 826, 833-834 (1984), tailored its harmless error ruling to what it considered the then-existing dictates of federal law. Moreover, the court expressly declined to consider whether its decision could also be justified on independent state grounds. *Id.* at 555, n. 10; 684 P.2d at 834, n. 10. Similarly, *People v. Lee*, 43 Cal.3d 666, 674-676; 738 P.2d 752, 757-758 (1987), followed this Court's then-latest harmless error dictates in *Rose v. Clark*, 478 U.S. 570, *supra*, and *Pope v. Illinois*, 481 U.S. 497 (1987). A footnote in *Lee* implied that a failure to instruct on an element might be reversible per se under *Sedeno* and its precursor, *People v. Modesto*, 59 Cal.2d 722, 730; 382 P.2d 33 (1963), but never suggested that those cases rest on independent state grounds, as opposed to then-extant understandings of federal constitutional law. *People v. Lee*, 43 Cal.3d at

675, n. 1; 738 P.2d at 757, n. 1, *supra*. And in *People v. Harris*, 9 Cal.4th 407, 429-432; 886 P.2d 1193, 1204-1207 (1994), the state high court applied this Court's analysis from *Yates v. Evatt*, 500 U.S. 391, *supra*, to find the instructional error harmless under federal law, giving no hint of independent state grounds. The state high court has attempted so consistently and so openly to adhere to federal law in this area (see also *People v. Osband*, 13 Cal.4th 622, 745; 919 P.2d 640 (1996) [failure to instruct on element of special circumstance governed by federal harmless error standard]; *People v. Johnson*, 6 Cal.4th 1, 44-45; 859 P.2d 673, 697-698 (1993) [same]) that Justice Kennard has repeatedly urged this Court to clarify that law. *People v. Osband*, 13 Cal.4th at 745, n. 3; 919 P.2d 640, 719, n. 3, *supra*, Kennard, diss.; *People v. Wims*, 10 Cal.4th 293, 328, n. 10; 895 P.2d 77, 98, n. 10 (1995), Kennard, J., conc. and diss.; *People v. Harris*, 9 Cal.4th at 460-461; 886 P.2d at 1227, *supra*, Kennard, J., conc. and diss. At the same time, Justice Mosk has written in this context that the California Supreme Court is

> "under a solemn obligation to interpret and implement the United States Constitution. We are no less capable of discharging that duty than any other court." *People v. Harris*, 9 Cal.4th at 449, n. 1; 886 P.2d at 1219, n. 1, *supra*, Mosk, J., conc. and diss.

If this issue created any possibility of independent state grounds, justices Mosk and Kennard would have entertained that possibility, rather than simply discussing the lack of clarity in federal law. One can hardly imagine a more clear example of an issue that the state has not resolved on independent state grounds.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Dated: September 17, 1996.

Respectfully submitted,

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